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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. VONNIE ROSS EDWARDS, Defendant and Appellant.	B209697 (Los Angeles County Super. Ct. No. BA272776)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathleen Kennedy-Powell, Judge. Affirmed.

Cynthia L. Barnes, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan Sullivan Pithey and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Vonnie Edwards evaded police officers, led them on a high speed car chase, and precipitated a non-fatal shootout. The jury found defendant guilty of the attempted murder of nine members of the Los Angeles Police Department—Officers Jose Torres, Manuel Botello, Matthew McNulty, German Hurtado, Alfredo Morales, Joseph Vasquez, Newlin Driller, Charles Kim, and James Canales in violation of Penal Code sections 664 and 187, subdivision (a)(1).[1] The jury found the attempted murders were willful, deliberate, and premeditated (§§ 664, 187, subd. (a)(1)), that defendant committed them by personally and intentionally firing a handgun (§ 12022.53, subd. (d)), and that defendant had reason to know his victims were peace officers engaged in performing their duties (§§ 664, subd. (e)). Defendant was also convicted of assault on a peace officer with a semi-automatic firearm, along with personal firearm use findings, as to the same nine officers. (§§ 245, subd. (d)(2), 12022.53, subds. (b) & (c).) Finally, the jury found defendant guilty of evading an officer (Veh. Code, § 2800.2, subd. (a)) and being a felon in possession of a firearm[2] (§ 12021, subd. (a)(1)).

The trial court imposed six consecutive sentences of 50 years to life on counts 1 through 3 and 5 through 7 for the attempted murder convictions as to Officers Torres, Botello, McNulty, Hurtado, Morales, and Vasquez (15 years to life doubled under the three strikes law, plus the 20-year firearm use enhancement). As to counts 8 through 10, the attempted murders of Officers Driller, Kim, and Canales, the court imposed identical concurrent sentences. For the assault convictions, counts 12 through 14 and 16 through 21, the court imposed terms of 38 years, stayed pursuant to section 654. A four-year term was imposed for the evading conviction (count 22), which was imposed concurrently

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[1] The jury acquitted defendant of the attempted murder and assault of Officer Michael Boyle, as alleged in counts 4 and 15. All further statutory references are to the Penal Code unless indicated otherwise.

[2] In a bifurcated bench trial, it was found defendant suffered a prior "strike" conviction within the meaning of the three strikes law (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)).

with the four-year term for being a felon in possession of a firearm (count 23). Finally, the court imposed a consecutive five-year term for the prior serious felony conviction enhancement under section 667, subdivision (a).

In his timely appeal, defendant contends (1) there was constitutionally insufficient evidence to support the convictions for the attempted murders of Officers McNulty, Vasquez, Driller, Kim, and Canales; (2) the trial court prejudicially informed the jury that he was in custody and that his tardiness in making court appearances could be considered as consciousness of guilt; and (3) the trial court erroneously and prejudicially denied his motion to discharge appointed counsel under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). We affirm.

STATEMENT OF FACTS

On October 7, 2004, Officer Torres was the passenger in the marked patrol car driven by his partner, Officer Botello. At approximately 7:45 p.m., they followed defendant's tan car to find out whether it was stolen. As defendant drove westbound on 23rd Street, they noticed the car had a broken tail light. Defendant made a right turn onto Crenshaw Boulevard without stopping for the stop sign. The officers turned on the siren and emergency lights to stop defendant for various Vehicle Code violations. Defendant continued to drive away, circling around 21st Street and Washington Boulevard two or three times at a very high rate of speed, before colliding with a parked black Nissan and stopping. Defendant got out of his car and the officers exited the patrol car.

Defendant moved around the black Nissan, holding a firearm in each hand. One of his arms was extended. Officer Torres ran towards defendant, but stopped suddenly and slipped when he saw defendant was armed. Almost immediately, the officer saw the muzzle flash on each gun, as defendant fired at him. Officer Torres scrambled back to the rear of his patrol car for cover, firing approximately three rounds at defendant in the process. Defendant fired four or five gunshots at the officer.

When Officer Botello got out of the patrol car and began to chase defendant on foot, he saw defendant pull out a handgun and fire approximately three rounds at Officer Torres. Officer Botello returned fire with his .45 caliber Glock. The officer's handgun jammed after firing four rounds, so he sought cover behind defendant's car.

Officer Hurtado and his partner, Officer Morales, were in their patrol car when they received a radio report from Officers Botello and Torres that they were pursuing defendant's tan car on Washington Boulevard, which was believed to be stolen.[3] Officer Hurtado made a U-turn and joined the pursuit at 8th Avenue and Washington Boulevard, behind Officer Botello's patrol car. By that time, a police helicopter was overhead in pursuit as well. As they followed defendant's car southbound on 7th Avenue, Officer Hurtado saw defendant crash into a parked black Nissan.

Officers Hurtado and Morales stopped their patrol car behind defendant's car. They saw defendant get out of his car, holding a firearm in both hands, and begin firing toward Officers Botello and Torres. Officer Hurtado began to shoot at defendant. Defendant moved in front of the Nissan and fired at Officer Hurtado, shattering the window of the opened passenger side door of his patrol car. Defendant was looking at Officer Hurtado as he fired.[4] One of defendant's handguns apparently ran out of ammunition. Defendant cursed the officer and threw the empty gun at him. Defendant pulled out another gun, turned, and fired at the newly arrived officers who had positioned themselves in a northerly direction from defendant—Officers McNulty and Boyle.

Meanwhile, Officer Hurtado shot defendant, causing him to fall and stop firing at the officers. Officer Hurtado approached defendant from the south, as the other officers defendant had been shooting at approached from the north. They found defendant lying

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3 It was stipulated that the car turned out not to be stolen.

4 Officer Morales saw defendant shoot at Officer Torres. When Officer Morales saw defendant look at him, the officer fired six rounds from his .9 millimeter Baretta semi-automatic handgun at defendant.

on his back, with his second gun lying nearby. Officers Torres and McNulty handcuffed defendant, who was treated at the scene by paramedics and taken to the hospital.

Officers Boyle and McNulty were in an unmarked police car. They heard a radio broadcast and responded to the scene. When they arrived, shots had already been fired. Officer Boyle saw defendant holding a handgun and firing at other officers in a southbound direction. Defendant would alternate between crouching behind the Nissan for cover and standing up to shoot. Officer Boyle got out of his patrol car, moved up the sidewalk toward defendant, and fired at least nine rounds from his .45 caliber Smith & Wesson at defendant.

Officer McNulty saw defendant fire at other officers, then turn toward Officer McNulty and fire in his direction. At that point, Officer McNulty returned defendant's fire, discharging 14 rounds at defendant from a position behind the Nissan. Officer McNulty was struck in his gun belt by a round that penetrated the patrol car's door. It was later determined that the round had been fired by another officer. After defendant had been brought down by Officer Hurtado's gunshot, Officer McNulty saw defendant's handgun lying close to defendant and kicked it away.

Officer Driller drove Officers Kim and Vasquez to the scene in a marked patrol car. As he was driving westbound on 21st Street, he heard gunshots and saw the front right window of Officer Hurtado's patrol car shatter. Officer Driller exited his patrol car and took cover behind the left front wheel. Officer Vasquez was standing to Officer Driller's immediate right. Officer Canales was standing on the other side of Officer Driller's patrol car. Drawing his service firearm, Officer Driller looked northbound toward defendant, who was holding what appeared to be a handgun in his right hand, with his elbow bent so that the gun was pointing upwards. The officer's view was illuminated by street lights, the patrol car headlights, and the helicopter. Defendant turned and extended his right arm so that his handgun pointed "straight towards" Officer Driller. The officer, fearing for his life, fired four shots at defendant. After firing, Officer Driller took cover behind his patrol car's wheel well. The officer did not see a

muzzle flash from defendant's firearm; however, his patrol car's light bar was struck by bullets on the left and right sides.

Officer Vasquez saw defendant fire two shots in the direction of a patrol car. Officer Vasquez fired twice at defendant, who turned and looked toward the officer and fired in the direction of his patrol car. As defendant continued to shoot in the direction of Officers Hurtado's and Morales's patrol car, Officer Vasquez fired two more shots at him. At some point, Officer Vasquez was struck in the head by a fragment from the plastic light bar on Officer Driller's patrol car, which had been struck by a bullet.[5] The officer ducked down for cover and heard several more shots fired. When he got up, the other officers were approaching defendant, who had been shot and was lying on the ground. The officer believed that defendant had shot in his direction.

Officer Canales was in his marked patrol car with a probation officer. When he arrived at the scene, the shooting was in progress. Officer Canales heard other officers shouting that they were under fire. He parked south of defendant, behind another patrol car, and took up a position next to Officer Driller, who was standing beside his patrol car. Officer Kim was also standing next to Officer Driller. Officer Vasquez was crouching down close to his partner, Officer Kim. Officer Canales saw defendant shooting at Officers Hurtado and Morales. Officer Canales returned fire with his .45 caliber Smith & Wesson semi-automatic when he saw defendant point his gun in his direction and fire. He was standing next to Officer Driller when the overhead light bar on Officer Driller's patrol car shattered.

Criminalist Rafael Garcia examined defendant's Colt semi-automatic handgun and his .45 caliber Glock semi-automatic handgun. The latter held 13 rounds of ammunition and was empty when found at the crime scene. Criminalist Daniel Rubin testified that 11 shell casings found at the shooting scene had been fired from defendant's .45 Glock handgun, not any of the officers' Glock handguns. Another casing found in front of the

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[5] Criminalist Nathan Cross confirmed the damage to the light bar on Officer Vasquez's patrol car was consistent with a gunshot.

black Nissan was fired from defendant's Colt handgun, as was a bullet found at the scene. He also testified that six shell casings had been fired from Officer Torres's Smith & Wesson.

DISCUSSION

Evidence of Concurrent Intent to Kill

Defendant contends there was constitutionally insufficient evidence to support the attempted murder convictions as to Officers McNulty, Vasquez, Driller, Kim, and Canales. More specifically, defendant argues there is no evidence of a reasonable, credible, and solid value that defendant intended to kill each of those officers. As we explain, the circumstantial evidence concerning defendant's actions at the shooting scene, including his demonstrated motive to shoot the officers, provided substantial evidence of defendant's concurrent intent to kill the officers.

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 317-320.) The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792.)" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) "Resolution of conflicts and inconsistencies in the testimony is the

exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

In his claim, defendant focuses on the specific intent element of attempted murder. Unlike murder, which can be based on implied malice arising out of a conscious disregard for human life, "'[a]ttempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.' [Citations.]" (*People v. Smith* (2005) 37 Cal.4th 733, 739 (*Smith*).) It follows that to support a conviction for a surviving victim, the prosecution must prove defendant "acted with specific intent to kill that victim." (*Ibid.*) Also, the doctrine of transferred intent does not apply to attempted murder: "'To be guilty of attempted murder, the defendant must intend to kill the alleged victim, not someone else. [Citation.]'" (*Id.* at p. 740.)

Nevertheless, the requisite intent may be found under a concurrent intent theory based on reasonable inferences drawn from circumstantial evidence such as motive and the nature of the defendant's acts. (*Smith*, *supra*, 37 Cal.4th at pp. 740-741.) Here, of course, the evidence of defendant's motive to kill all the officers at the scene was very strong. Moreover, "[e]vidence of motive aside, it is well settled that intent to kill or express malice, the mental state required to convict a defendant of attempted murder, may in many cases be inferred from the defendant's acts and the circumstances of the crime. [Citation.] 'There is rarely direct evidence of a defendant's intent. Such intent must usually be derived from all the circumstances of the attempt, including the defendant's actions. [Citation.]" (*Id.* at p. 741.)

Under the concurrent intent doctrine, "the act of purposefully firing a lethal weapon at another human being at close range, without legal excuse, generally gives rise to an inference that the shooter acted with express malice. That the shooter had no particular motive for shooting the victim is not dispositive, although again, where motive is shown, such evidence will usually be probative of proof of intent to kill. Nor is the circumstance that the bullet misses its mark or fails to prove lethal dispositive—the very act of firing a weapon '"in a manner that could have inflicted a mortal wound had the

bullet been on target"' is sufficient to support an inference of intent to kill." (*Smith, supra,* 37 Cal.4th at p. 742, quoting *People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690 (*Chinchilla*).)

Thus, an attempted murder conviction will stand even when a single gunshot failed to strike either victim in the same line of fire. "[E]vidence that defendant purposefully discharged a lethal firearm at the victims, both of whom were seated in the vehicle, one behind the other, with each directly in his line of fire, can support an inference that he acted with intent to kill both." (*Smith, supra,* 37 Cal.4th at p. 743.) In *Chinchilla*, we "affirmed two convictions of attempted murder based on the firing of a single bullet at two police officers who were crouched, *one behind the other,* in the shooter's line of fire," holding "'intent to kill two different victims can be inferred from evidence that the defendant fired a single shot at the two victims, both of whom were visible to the defendant.'" (*Smith, supra,* at p. 744, quoting *Chinchilla, supra,* 52 Cal.App.4th at p. 685.)

Here, defendant's motive to kill the officers coupled with defendant's conduct—pointing a handgun in the officers' direction and firing—provided a reasonable, credible, and solid basis for inferring a specific intent to kill Officers McNulty, Vasquez, Driller, Kim, and Canales. First, it must be noted that the shooting scene was illuminated by street lights, the patrol car headlights, and the light from the circling police helicopter. Further, all the officers were uniformed, and defendant had been chased by two marked patrol cars with sirens and emergency lights. Not only did defendant initiate the shooting by firing at the first officers to arrive, but defendant swore at Officer Hurtado and threw his first handgun at him. Thus, there can be no serious doubt as to defendant's malice and motive to kill the officers, all of whom were preventing his escape.

Officer McNulty testified that he saw defendant turn toward him and fire in his direction. That evidence easily suffices to support a finding of specific intent to kill. (See *Smith, supra,* 37 Cal.4th at pp. 743-744.) The fact that Officer McNulty's gun belt was struck by a bullet fired by another officer hardly renders the officer's testimony physically impossible or inherently improbable.

Officers Driller and Vasquez provided ample support for findings of specific intent to kill them, as well as Officers Canales and Kim. The latter two officers were standing next to Officer Driller when he saw defendant point his gun at him. Although Officer Driller did not see defendant fire in his direction, he heard gunshots and the light bar of the patrol car that all three officers were using for cover was struck by bullets on the left and right sides. Again, according to Officer Driller, the area was illuminated. As such, it would have been reasonable to infer that defendant saw and purposefully shot at all the officers. (See *Smith, supra,* 37 Cal.4th at pp. 743-744.) Officer Vasquez testified that he was crouching down close to his partner, Officer Kim. From a kneeling position, Officer Vasquez looked toward defendant and saw him turn toward the patrol car they were using as cover. Defendant took aim and fired in their direction. The fact that Officer Vasquez was struck in the head by a fragment from the plastic light bar serves to strengthen that inference as it shows his proximity to Officer Driller's patrol car. Additionally, Officer Canales testified that he too was standing next to Officer Driller when the overhead light bar on Officer Driller's patrol car shattered.

Those same facts also justified the jury's verdicts based on the "kill zone" theory recognized by our Supreme Court in *People v. Bland* (2002) 28 Cal.4th 313 (*Bland*). The court instructed, pursuant to CALJIC No. 8.66.1: "A person who primarily intends to kill one person, may also concurrently intend to kill other persons within a particular zone of risk. The intent is concurrent when the nature and scope of the attack, while directed at a primary victim, are such that it is reasonable to infer the perpetrator intended to kill the primary victim by killing everyone in that victim's vicinity. [¶] Whether a perpetrator actually intended to kill the victim, either as a primary target or as someone within a zone of risk is an issue to be decided by you."

"*Bland* simply recognizes that a shooter may be convicted of multiple counts of attempted murder on a 'kill zone' theory where the evidence establishes that the shooter used lethal force designed and intended to kill everyone in an area around the targeted victim (i.e., the 'kill zone') as the means of accomplishing the killing of that victim. Under such circumstances, a rational jury could conclude beyond a reasonable doubt that

the shooter intended to kill not only his targeted victim, but also all others he knew were in the zone of fatal harm. (*Bland, supra,* 28 Cal.4th at pp. 329-330.) As we explained in *Bland,* 'This concurrent intent [i.e., "kill zone"] theory is not a legal doctrine requiring special jury instructions . . . . Rather, it is simply a reasonable inference the jury may draw in a given case: a primary intent to kill a specific target does not rule out a concurrent intent to kill others.' ([*Id.*] at p. 331, fn. 6.)" (*Smith, supra,* 37 Cal.4th at pp. 745-746.)

Thus, it would have been reasonable for the jury to infer that defendant's primary targets were Officers Driller and Vasquez, and that his secondary targets were Officers Canales and Kim, who were within the zone of risk.

Instructional Error Claim

Defendant contends the trial court violated his federal constitutional rights to due process and to have each element of the charged offenses proved beyond a reasonable doubt under the Fifth, Sixth, and Fourteenth Amendments when it informed the jury that defendant was incarcerated and at fault for twice delaying the trial by his failure to cooperate with the sheriff's department in bringing him to court—and that the jurors would be instructed that they could decide whether defendant's conduct supported an inference of his consciousness of guilt. As we explain, the court's subsequent curative instruction eliminated any reasonable possibility of prejudice.

On the morning of Thursday, July 3, 2008, the third day of trial testimony, the trial court confirmed that defense counsel had been informed that defendant was refusing to leave the holding cell. Counsel, representing that he had "a good relationship" with defendant agreed to visit defendant to try to get him to attend the trial. The prosecutor recounted defendant's prior acts in feigning illness to absent himself from trial during the preliminary hearing. At noon, defendant was in court outside the jury's presence. The court told defendant that it was "not happy" with him for keeping the jury waiting all morning. Defendant said the delay was not his fault, but the court disagreed. Defendant

asserted that he refused to be transported to court because of "safety issues"—he was no longer receiving a special escort for his protection. The court told defendant it would be in his best interest to have the trial proceed as expeditiously as possible and brought in the jury.

After the day's testimony ended and the jury was excused, defendant told the trial court: "We're going to have the problem" when trial was scheduled to resume the following Monday. The court responded by warning defendant that if he refused to cooperate and failed to attend court in a timely fashion on Monday, the court would proceed without him and find that he voluntarily absented himself from court proceedings. Defendant insisted he was not playing "games," but acting on safety concerns involving threats to his life. The court said that it found his assertions dubious and again cautioned defendant to cooperate with the authorities regarding transportation to court. Defendant said the police were fighting him and he needed protection. The court, however, observed nothing indicative of such attacks and warned defendant not to do anything to delay his attendance at court.

On Monday at 11:45 a.m., the trial court informed defendant and counsel outside the jury's presence that it intended to tell the jurors why the morning session had been delayed more than two hours. Because defendant disregarded the court's order, the jury would be instructed that defendant's refusal in coming to court could be considered as consciousness of guilt. Defendant protested that he did not refuse to come to court, but was always ready to go—one of the officers responsible for his transportation misrepresented defendant's intentions. Defendant's counsel objected.

After replacing a juror who was being treated in the hospital, the trial court addressed the jurors and expressed sympathy for their frustration over the recent delays. It explained that defendant was in custody and failed to cooperate in being brought to court. On the previous Thursday, defendant only came to court after his counsel persuaded him to do so. All the other jail inmates managed to be transported to their court appearances. However, on this Monday, defendant again refused to cooperate, causing the court to order the sheriff's department to bring defendant to court by "any

means necessary." The delay in commencing trial was attributable to the time the deputies needed "to get him to court." The court instructed that the jury had the option to decide whether defendant's refusals to come to court supported an inference of his consciousness of guilt. It would provide such an instruction later in the trial, but it would be for the jury to decide whether to make such a finding. At the close of evidence that day, before excusing the jurors, the court repeated its admonition not to form or express any opinion about the case.

The following day, in the course of finalizing jury instructions outside the jury's presence, the prosecutor requested the jury not be instructed on consciousness of guilt based on his delayed appearances to court. The prosecutor was concerned that there was no direct testimony from jail personnel concerning defendant's actions and the excuse defendant offered. The trial court decided it would instruct the jury not to consider defendant's tardiness because there was no evidence as to why defendant was late. The parties agreed with the proposed instruction, with defense counsel clarifying that his agreement with the curative instruction was not intended to waive his original objection to the court's statements to the jury on July 7.

As the final jury instruction, the trial court stated: "You were advised that the defendant was late to court on both July 3rd, 2008 as well as July 7th, 2008. Since there was no evidence presented as to the specific reason why the defendant was late to court on those dates, I'm hereby instructing you not to consider that as evidence of guilt or allow that fact to influence your deliberations in any way. Please disregard anything to the contrary that I may have said during the course of the trial."

"In determining whether an instruction interferes with the jury's consideration of evidence presented at trial, we must determine 'what a reasonable juror could have understood the charge as meaning.' (*California v. Brown* (1987) 479 U.S. 538[, 541].) While the initial focus is on the specific instruction challenged (*Francis v. Franklin* (1985) 471 U.S. 307, 315), we must also review the instructions as a whole to see if the entire charge delivered a correct interpretation of law." (*People v. Garrison* (1989) 47 Cal.3d 746, 780.) That is, even "[i]f the specific instruction fails constitutional muster,

we then review the instructions as a whole to see if the entire charge delivered a correct interpretation of the law." (*California v. Brown, supra,* at p. 541.)

Defendant first asserts that the trial court's disclosure of defendant's custodial statement is tantamount to the kind of federal constitutional violations that occur when a criminal defendant is visibly shackled during trial in the absence of a special need (see *Deck v. Missouri* (2005) 544 U.S. 622, 626) or compelled to stand trial before a jury while dressed in prison clothes (*Estelle v. Williams* (1976) 425 U.S. 501, 505-506). Nothing in the record suggests that the jury ever viewed defendant in shackles or in jail clothes. The constitutional dimension of the Supreme Court decisions concerning unwarranted shackling and the compelled wearing of identifiable jail clothes was predicated on the jurors' viewing those items on the defendant, not on the mere disclosure of a defendant's custodial status. (*Deck v. Missouri, supra,* at p. 630 ["Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process"]; *Estelle v. Williams, supra,* at pp. 504-505 ["the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment. The defendant's clothing is so likely to be a continuing influence throughout the trial that, not unlike placing a jury in the custody of deputy sheriffs who were also witnesses for the prosecution, an unacceptable risk is presented of impermissible factors coming into play"].)

Nor can the trial court's initial statement to the jury be equated to instructing the jury with a statutory presumption where there is "no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience." (*Tot v. United States* (1943) 319 U.S. 463, 467-468, fn. omitted.) Here, of course, the court in its initial statement did not refer to a mandatory presumption, but left the inference of consciousness of guilt to the jury's discretion. Moreover, the permissive inference adverted to by the court can hardly be termed as being "so strained as not to have a reasonable relation to the circumstances of life as we know them." (*Id.* at p. 468.) If, as the court had reason to believe, defendant's tardiness was attributable to his unjustified

failure to cooperate with the jail personnel, then an inference of consciousness of guilt would make good sense.

In any event, even if the court's initial statement was improper, the court cured any reasonable possibility of prejudice by its subsequent instructions. In conducting our harmless error analysis, we review the instructions as a whole and apply *Chapman v. California* (1967) 386 U.S. 18, to determine whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Id.* at p. 24; see *Yates v. Evatt* (1991) 500 U.S. 391, 402-403, overruled on another ground in *Estelle v. McGuire* (1991) 502 U.S. 62.) In that context, an error will not be said to contribute to the verdict if the error is found to be "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*Yates v. Evatt, supra,* at p. 403.)

Here, it must be remembered that the trial court's initial statement concerning defendant's custody status, tardiness, and possible consciousness of guilt was only preliminary. The court made it clear that the jury would receive instructions on that matter later, and it admonished the jury not to begin deliberations. When the jury was given its instructions the next day, the court unambiguously instructed the jury not to consider the court's prior references as evidence of guilt or to influence the jurors' deliberations in any way. By way of explanation, the court told the jury that there was "no evidence presented as to the specific reason why the defendant was late to court." The court concluded: "Please disregard anything to the contrary that I may have said during the course of the trial." Prior to that, the court properly instructed the jury on the elements of each count and the prosecution's burden of proving each element beyond a reasonable doubt.

"'[It is] the almost invariable assumption of the law that jurors follow their instructions.' [Citation.] '[We] presume that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them.' [Citations.]" (*United States v. Olano* (1993) 507 U.S. 725, 740; *People v. Romo* (1975)

14 Cal.3d 189, 195; *People v. Sisneros* (2009) 174 Cal.App.4th 142, 152-153.) There is no reason to disregard that presumption here. The trial court gave clear, easy to follow instructions to disregard its prior statements and did so prior to deliberations. In addition, its explanation implied the possibility that defendant's tardiness was justifiable. Finally, we note that the prosecution evidence was truly overwhelming as to nearly every one of the 23 counts on which he was tried. Nevertheless, from the fact that the jury found him not guilty of counts 4 and 15, the attempted murder and assault of Officer Boyle, we can infer the jurors attended to their task carefully and in good faith.

***Marsden* Motion**

Defendant contends the trial court erroneously and prejudicially denied his *Marsden* motion to discharge appointed counsel, which he brought after the trial on the substantive offenses and before trial on the prior convictions allegation. On appeal, his specific allegation is that the trial court conducted an inadequate inquiry into defendant's asserted instances of ineffective assistance of counsel. However, as the Attorney General points out, the instances of supposed ineffective assistance urged on appeal were not the primary bases asserted at the *Marsden* hearing, and the others are merely indicative of tactical disagreements.

"When a defendant seeks new counsel on the basis that his appointed counsel is providing inadequate representation . . . , the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of inadequate performance. A defendant is entitled to relief if the record clearly shows that the appointed counsel is not providing adequate representation or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result. Substitution of counsel lies within the court's discretion. The court does not abuse its discretion in denying the motion unless the defendant has shown that a failure to replace counsel would substantially impair the defendant's right to assistance of

counsel." (*People v. Smith* (2003) 30 Cal.4th 581, 604.) We review a ruling on a request to relieve counsel for abuse of discretion. (*Marsden, supra,* 2 Cal.3d at p. 124.)

Defendant offered three grounds for his motion: (1) defense counsel failed to object despite defendant informing counsel that the prosecutor was showing photographs to witnesses in a manner supposedly intended to coach or lead the witnesses; (2) after the first day of trial, defense counsel sat in the chair closer to the prosecution, leaving a chair between counsel and defendant, thereby conveying to the jury counsel's alliance with the prosecution against defendant; and (3) toward the close of trial, defense counsel was "constantly yawning," which showed disrespect to defendant and lack of concern as to the case. Defendant added that defense counsel's closing argument was only 14 minutes long and failed to address "a couple of issues and inferences," including defendant's "skill as far as shooting a gun" and his ability "to get the door handle while I was reaching my hand outside the car and . . . throwing stuff out of the car."[6]

Our review of the record shows that the trial court gave painstaking attention to defendant's three primary complaints against counsel, courteously conferring with defendant so as to understand the nature of his complaints. Having done so, the court gave cogent, well-supported reasons why those complaints did not support a finding of inadequate representation or an irreconcilable conflict between defendant and counsel likely to preclude adequate representation. Among other things, the court found no basis for objecting to the prosecutor's actions with regard to the photographs, except in the instance when the court granted a defense objection. Defense counsel said that it never occurred to him that he had moved seats and that he would have moved back if defendant had asked at any time. The court found no basis to think that counsel gave any negative impression to the jury either by his seating choice or facial expressions.

Defendant does not challenge those findings or contend otherwise. Rather, he asserts the trial court failed to give adequate consideration as to allegations that defense

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6 We granted the Attorney General's unopposed request to unseal the *Marsden* hearing transcript.

counsel conducted little or no cross-examination of the police officers, produced no defense evidence, and offered a theory during closing argument without an evidentiary basis—that defendant lacked the requisite intent to kill because his actions were those of a suicide. We do not consider the final point because it was never asserted below. Defendant did mention in passing defense counsel's failure to present evidence and the brevity of counsel's closing argument. However, those complaints were merely indicative of a disagreement over tactical matters, and disagreements over tactical matters do not state a case for inadequate or ineffective representation. (*People v. Lucky* (1988) 45 Cal.3d 259, 281-282.) As such, defendant fails to show the court abused its discretion in denying his *Marsden* motion.

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.